SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1015

WILLIAM H. EISENLORD, AS ADMINISTRATOR OF THE ESTATE OF MAUDE F. ADDIE, DECEASED,

Petitioner,

vs.

MAY ELLIS, MYRTLE CONLON AND LILLIE SCHUFELDT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S REPLY BRIEF.

BENTLEY M. MCMULLIN,
Counsel for Petitioner.

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MISCELLANEOUS.

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REPLY BRIEF.

Respondents quote (p. 2)* the following clause from the policies: "At the maturity of this policy, the Company, unless otherwise directed, will extend the above options to the beneficiaries". But the certificate which was issued to Mrs. Addie (R. 120-121) was not authorized by the policies. The settlement options in the policies (R. 116-117) did not provide for payment over of the fund upon death of the beneficiary and expressly limited the beneficiary to the exercise of only one option. The interest income certificate did provide for the payment over of the fund upon the death of the donor and extended to the donor during

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* The references (p. 2, etc.) are to the pages of the Brief in Opposition to the Petition for Writ of Certiorari.

her lifetime the right to exercise either of two additional options. The interest income certificate was an entirely new and independent transaction in no way arising out of or connected with the insurance policies, as the Circuit Court of Appeals held (R. 158).

The respondents say (p. 3) that petitioner, as Administrator, "is entitled to no part of the Estate of Maude Addie". The contrary is true; no one but the administrator may lawfully make claim to the fund in question on behalf of her estate.

4 Colorado Statutes Annotated, 1935, Ch. 176, Sec. 115, and annotations Respondents cite (p. 3);
Internal Revenue Code, Estate Tax, Sec. 811 (c);
Helvering v. *Hallock*, 309 U. S. 106 (1940);

which, they say, "will indicate the taxability of the funds in the transaction at bar." If that is true it must be because the transaction at bar is in the nature of a testamentary disposition. The trusts described in the *Hallock* case resemble the transaction now before the court, and, as was said in that case in discussing the earlier decision of *Klein* v. *U. S.*, 283 U. S. 231:

> "The inescapable rationale of this decision, rendered by a unanimous Court, was that the statute taxes not merely those interests which are deemed to pass at death according to refined technicalities of the law of property. It also taxes *inter vivos* transfers that are too much akin to testamentary dispositions not to be subjected to the same excise." (p. 112.)

This language, as we understand it, means that in deciding whether a transaction is subject to payment of an inheritance tax the substance and not the technical form of the transaction is the determining factor. We contend in the present case that the substance and not the technical form of the transaction should be considered in determining whether or not it is testamentary.

The other authorities cited (p. 3), namely,

Internal Revenue Code, Sec. 22 (b);

Treasury Department Regulations 103, Sec. 19.22 (b)—1;

Burnet v. *Wells*, 289 U. S. 670 (1933);

Bailey v. *U. S.*, 31 Fed. Supp. 778 (1940);

concern taxation of income from the proceeds of life insurance policies invested in accordance with options contained in the policies. Since in this case the fund was not invested in accordance with the options contained in the policies, as hereinabove demonstrated, these additional authorities have no application to the facts of this case.

The Colorado state inheritance tax law does not cover the transaction in question:

Colorado Statutes Annotated, 1935, Ch. 85, Secs. 6-13.

The statement in our petition that tax evasion was one of the purposes which the instrument in question was designed to further has not been answered merely by pointing out that the fund can be taxed if our own theory of the case is correct. If the decision of the Circuit Court of Appeals is not disturbed the interest of the sisters-in-law will not be taxable, because under that decision there is no transfer of property involved.

Latterman v. *Guardian Life Insurance Co.*, 280 N. Y. 102, 19 N. E. (2d) 978 (1939);

cited by respondents (p. 3) concerned the right of infant beneficiaries under a life insurance policy to exercise an option contained in the policy itself. The question primarily at issue was whether estate funds could be so invested. Since there is no exercise of a policy option involved in the present case this decision is inapplicable.

Warren, Executrix, v. *United States*, 68 Court of Claims 634 (1936), cited by respondents (p. 3) was decided by the Court of Claims and argued by the Government in its brief

on petition for certiorari to this Court (denied, 281 U. S. 739) upon the ground that the borrowing powers of the United States enable it to designate the persons to whom upon the death of registered owners the proceeds of its bonds shall be payable, in contravention, if necessary, of the laws of a state. In its brief filed in this Court the Government ignored all question as to the testamentary character of the transaction, considering the Government's powers a sufficient answer to any argument on that point. The case of

> *In re Stanley's Estate*, 102 Colo. 422, 80 P. (2d) 332 (1938),

cited by respondents (p. 7) unhesitatingly recognizes this rule. There can be no question of the power of the United States Government to determine how, and to whom, its own obligations shall be payable. The United States may also determine the persons to whom savings from pension money shall be distributed after the death of a pensioner:

> *National Home for Disabled Volunteer Soldiers* v. *Wood*, 299 U. S. 211 (1936).

In the case of

> *Stevens* v. *United States*, 89 F. (2d) 151 (C. C. A. 1, 1937),

cited in our petition for certiorari at page 10 and referred to by respondents (p. 6), in which it was held that because the transaction was testamentary in character Congress did not have power to legislate with reference to the distribution of the property of a veteran in the National Home for Disabled Volunteer Soldiers, the Circuit Court of Appeals for the First Circuit was thus careful to point out (opinion, p. 152, col. 2) "that this deposit was not the proceeds of a Government pension or any other kind of gratuity from the government, but was his own personal estate", as also stated elsewhere in the opinion. The

fact that no Government funds or moneys or financial obligations were involved in the *Stevens* case readily distinguishes that case from the *Warren* case, and the fact that neither an Act of Congress nor any governmental obligation is here involved distinguishes the case at bar from the *Warren* decision.

Respondents refer (p. 4) to two law review case notes cited by the Circuit Court of Appeals (R. 159), namely,

53 Harvard Law Review, 1060, and
51 Yale Law Journal, 30.

The note in the Harvard Law Review first argues that the *McCarthy* decision was incorrect because the reservation of a life interest does not invalidate a gift, and cites cases so holding; but the present case is not one in which a life interest has been reserved by the donor—it is a case in which the entire interest with full power of disposition has been reserved by the donor and in which the right of the donees is contingent upon one or more of them surviving the donor. The note next argues that the agreement in the *McCarthy* case could have been upheld as being a contract for the benefit of a third party donee beneficiary without, however, considering the effect upon such a contract of the uncertain and conditional provisions which are here involved. Of the three cases cited on this point, two are New York cases which hold that such a transaction as is here involved does not create a valid third party contract:

Priester v. *Hohlock*, 70 App. Div. 256, 75 N. Y. S. 405 (1902);
Townsend v. *Rackham*, 142 N. Y. 516, 38 N. E. 731 (1894).

The third case, *Seaver* v. *Ransom*, will be presently referred to. The note is less persuasive than might have been supposed; certainly its writer did not have in mind the kind of transaction here involved.

The note in the Yale Law Journal criticizes not only *McCarthy* v. *Pieret* but the entire doctrine that the requirements of the statute of wills should be upheld. The authors take the view that if a document is authentic, it should be given effect, and that the intention of donors should be carried out even if what the article calls ritualistic requirements are neglected. We cannot argue whether the requirements of the statute of wills are just or not. We know that the requirements exist, and that the law compels compliance with them. We know, furthermore, that it is not, in general, best to permit testamentary gifts to be made secretly or in such a manner as to defeat the just claims of creditors. We even feel that the rights of legal heirs are entitled to consideration.

In re Koss's Estate, 106 N. J. E. 323, 150 A. 360 (1930), referred to by respondents (p. 4) was a case in which *the fund in question had been transferred to trustees.* The trustees had title to the fund; the entire property in the fund was vested in them. It is because of this that the court said: "It is obvious * * * that there is no specific property to which Gertrude Koss in her lifetime was ever entitled." It was because of this that the rules of contract were held to be applicable; the fund could not be withdrawn by the donor and there was no resulting uncertainty. The court makes this clear, saying: "If it appeared anywhere in the record that Gertrude Koss had a fund which she could compel the transfer of, then the rule of *Stephenson* v. *Earl* would apply." In the present case Mrs. Addie did have a fund which she could compel the transfer of, the rule of *Stephenson* v. *Earl* does apply, and the transaction is testamentary and void.

Seaver v. *Ransom*, 224 N. Y. 233, 120 N. E. 639 (1918), cited by respondents (p. 5) does, it is true, hold that a contract for the benefit of a third party beneficiary is valid and enforceable, but that case does not consider nor decide whether a contract uncertain and contingent in nature and

executed with testamentary intent would be upheld. That point was, however, decided adversely to the claims of the respondents in *Townsend* v. *Rackham, supra,* and in *McCarthy* v. *Pieret,* cited in our petition, page 7.

Basket v. *Hassell,* 107 U. S. 602 (1883), is said (p. 5) not to conflict with the decision in this case because there was "no promise therein on the part of the bank to pay the proceeds represented by the certificate to the third party beneficiary." But the certificate was negotiable and payable to the order of the payee; the payee indorsed the certificate to Martin Basket and delivered it to him; and this indorsement, plus delivery, created a fixed and irrevocable contract right in Basket. Nevertheless the fact that by his indorsement the payee reserved, during his lifetime, control over the fund, rendered the transaction testamentary and invalid because not executed as a will.

Hill v. *Capitol Life Insurance Co.,* 91 Colo. 300, 14 P. (2d) 1006 (1932); *Grimes* v. *Barndollar,* 58 Colo. 421, 148 Pac. 256 (1914), cited by respondents (p. 6) are cases arising under insurance contracts.

We are unable to find any reference in the New York Insurance Reports cited by respondents (p. 6) to transactions of the kind now under consideration, nor would a decision in this case be likely to cause a furor, as respondents believe likely (p. 7), in connection with the issuance of United States bonds, since, as pointed out in our discussion of the *Stevens* case, the Federal Government is not bound to make its obligations payable in conformity with the laws of the States; but if the statements so made by respondents were true, they would only serve to emphasize the importance of the question presented and the necessity for granting the writ of certiorari asked for, since the effect described must already have resulted from the decision of the Circuit Court of Appeals for the First Circuit in the *Stevens* case.

There has been much discussion in this case as to whether

the transaction in question involves contract or property rights. We are unable to see how the rights which are here involved could be contractual. The so-called contract would provide for the payment of the fund only in the event of death and only if one or more of the named donees was then surviving and only if the donor had not, in the meantime, withdrawn the fund. There could be no valid and enforceable right created by an agreement to do such uncertain and contingent things.

Restatement, Contracts, Section 32;
Williston on Contracts (1936 edition), Section 43.

But this is only one answer to the problem. The other answer is that no matter whether the transaction takes the form of a deed, a gift, an agency or a contract, it is still testamentary and effective only if properly executed as a will if its purpose is to do that which only a will can do.

28 Corpus Juris 624, Gifts, Section 11;
28 Corpus Juris 648, Gifts, Section 43;
68 Corpus Juris 611, Wills, Section 234;
68 Corpus Juris 618, Wills, Section 238.

This is true whether the deed, gift, agency or contract is otherwise valid and in due form. Whether the transaction be called a deed, a gift, an agency or a contract, the only question really involved is whether it is in its essential purpose a last will and testament. If so, it is invalid unless there has been compliance with the statute of wills. And in the present case in truth and in fact, in spirit and intent, as well as under the authorities, Mrs. Addie's provision for her sisters-in-law was testamentary in purpose and effect. Not having been executed as a will it cannot be sustained.

Respectfully submitted,

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